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J. Rodney Johnson

University of Richmond School of Law

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WILLS, TRUSTS, AND ESTATES

J. Rodney Johnson *

I. INTRODUCTION

The General Assembly enacted legislation dealing with wills, trusts, and estates that added or amended a number of sections of the Virginia Code in its 2002 Session. In addition, there were ten Supreme Court of Virginia opinions and two United States District Court opinions raising issues of interest to the general practitioner as well as the specialist in wills, trusts, and estates during the period covered by this review. This article reports on all of these legislative and judicial developments.¹

II. LEGISLATION

A. Intestate Succession—Appointment of Administrator—Priorities

When a person dies intestate, the basic rule of Virginia Code section 64.1-118 has been to give a surviving spouse the first priority to qualify as administrator on the decedent’s estate or, in the absence of a spouse who wishes and is able to qualify, to allow “such of the others entitled to distribution as the court or clerk shall see fit” to qualify.² However, anecdotal evidence before the General Assembly indicated that the spousal priority was producing unsatisfactory results in some cases where a step-parent spouse received only one-third of the decedent’s estate and the

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* Professor of Law, Emeritus, University of Richmond School of Law.
1. In order to facilitate the discussion of numerous Virginia Code sections, they will often be referred to in the text by their section numbers only. Unless otherwise stated, these section numbers will refer to the latest printing of the old sections and to the 2002 Supplement for the new sections.
decendent's children received the other two-thirds. Although normally not a problem in cases where harmonious relations existed within the blended families and the step-parent spouse was regarded as a "good" person by the step-children, the step-parent administrator's exclusive management and control of the decedent's personal estate regularly led to problems in the other cases. In addition, the second priority, for "other distributees," was becoming an increasing source of problems because of its typical "race to the courthouse" outcome. Too often, it was claimed, the fleetest of foot was not the best—and sometimes might even be the worst—person to serve as administrator for a variety of reasons. House Bill 1732 was introduced in the 2001 Session in an attempt to remedy some of these problems, but, notwithstanding its passage by the General Assembly, an unexplained gubernatorial amendment accepted during the 2001 Special Session provided "[t]hat the provisions of this act shall not become effective unless re-enacted by the 2002 Session of the General Assembly and signed by the Governor."4

However, instead of re-enacting this 2001 act, the 2002 Session passed a substantially different bill that appears to resolve both of the above-described problems. Under its provisions, qualification before the clerk during the first thirty days following an intestate's death is restricted to a sole distributee or, if there are two or more distributees, to a distributee who presents written qualification waivers from the other competent distributees. Accordingly, the only persons who will be permitted to qualify in the clerk's office during the first thirty days following an intestate's death will be: (1) a spouse who is a sole distributee;8 (2) a spouse

6. VA. CODE ANN. § 64.1-118(A)(1) (Repl. Vol. 2002). The statute allows an eligible distributee to qualify personally or to appoint a "designee" to serve in the distributee's place. Id. Although this statute speaks in the singular, the clerk may, of course, qualify two or more distributees (or designees) as co-administrators during this thirty-day period so long as there is agreement or waivers from all concerned. See id. § 1-13.15 (Repl. Vol. 2001). In estates with multiple distributees, such multiple qualification will eliminate the need for the administrators to post surety upon their official bond if they otherwise satisfy the requirements. Id. § 64.1-121 (Repl. Vol. 2002).
7. The surviving spouse may be a sole distributee because the surviving spouse is the parent of all the decedent's children or descendants of deceased children, or because the decedent left no children or descendants of deceased children. Id. § 64.1-11 (Repl. Vol.
step-parent who has the consent of the decedent's competent children and descendants of deceased children; (3) any distributee who is a sole taker, or (4) any distributee who presents written waivers from all other competent distributees. Thus the "wrong" spouse step-parent will no longer be able to qualify during the thirty-day priority period (due to lack of waivers), but there should be no problem with the "right" spouse step-parent qualifying (with waivers) during this period. After this thirty-day period has passed, the qualification process reverts to a "race to the clerk's office" among the distributees with one important exception. If, during the initial thirty-day period, more than one distributee notifies the clerk of an intent to seek qualification when this period has expired, the clerk is prohibited from appointing anyone until "the clerk has given all such distributees an opportunity to be heard." Thus the fleetest of foot will no longer necessarily become the administrator, as often happened in the past. Instead, the clerk will hear the arguments of all who gave such notice and pick the one best qualified for the task. This is not to suggest that time no longer has meaning because, presumably, if all who seek appointment are equally qualified, the clerk will appoint the one who made the first request. A third provision slightly recasts prior law by authorizing the clerk to appoint "one or more of the creditors or any other person" as administrator after sixty days have passed since the death of the intestate.

Lastly, the new rules authorize the court to appoint administrators pursuant to the same rules as the clerk, and, in order to provide for flexibility in unusual cases, "when the court determines that it is in the best interests of an intestate's estate, the court may depart therefrom at any time and appoint such person as the court, in the exercise of its discretion, deems most appropriate."

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8. Id. § 64.1-118 (Repl. Vol. 2002).
9. Id. § 64.1-118(A)(2).
10. Id.
11. Id. § 64.1-118(A)(3). Prior law permitted such a qualification after thirty days had expired, and imposed certain notice requirements in favor of any surviving spouse. Id. (Editor's note). These notice requirements are continued by the new law in favor of any sole distributee, whether or not a spouse. Id. (Editor's note).
12. Id. § 64.1-118(A)(4).
B. Power of Attorney—Safe-Deposit Box—Access

It has become a very normal practice for persons who execute wills to avoid the default dispositive provisions of Virginia succession law upon their death, to also execute business and medical powers of attorney to avoid the default management provisions of Virginia's conservatorship\(^\text{13}\) and guardianship\(^\text{14}\) laws upon their incapacity.\(^\text{15}\) It is also a normal practice for persons leasing safe-deposit boxes for the safeguarding of their valuables to place their wills and powers of attorney therein. The 1984 Session responded to the post-death access problems relating to wills in safe-deposit boxes, when the decedent is the sole lessee or when no co-lessee is reasonably available, by adding Virginia Code section 6.1-332.1 to provide permissive authority for a "company or bank" to allow certain persons to make a supervised search of the decedent's box for a will and to remove "the will or testamentary instrument for transmission to the appropriate clerk."\(^\text{16}\)

The 2002 Session of the General Assembly, faced with post-incapacity access problems relating to powers of attorney in safe-deposit boxes when the incapacitated principal is the sole lessee or when no co-lessee is reasonably available, amended Virginia Code section 6.1-332.1 in an attempt to provide a similar permissive remedy.\(^\text{17}\) However the amendment's too-literal parallelism raises a variety of interpretation issues because wills and powers of attorney are quite dissimilar and they operate in different contexts. Although it makes sense to provide for access to a safe-deposit box by "the spouse or next of kin . . . or by a court clerk or other interested person" when dealing with a will, one wonders about the identity of the latter two persons vis-à-vis a power of

\(^{13}\) A conservator is "a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person." Id. § 37.1-134.6 (Cum. Supp. 2002).

\(^{14}\) A guardian is "a person appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence." Id.


\(^{16}\) Id. § 6.1-332.1 (Repl. Vol. 1999).

\(^{17}\) Id. § 6.1-332.1(B) (Cum. Supp. 2002).
attorney.\textsuperscript{18} In the case of a death, the authorized person may only remove testamentary instruments and then only “for transmission to the appropriate clerk.”\textsuperscript{19} But in the case of an incapacity, the authorized person—though permitted to remove any power of attorney—is given no instructions concerning its delivery.\textsuperscript{20} In addition, although the statute’s language that a “company or bank may require proof of death or incapacity in the form of a letter from a licensed physician, as it deems necessary”\textsuperscript{21} should present no problem in the case of a will, there are two alternative definitions of incapacity.\textsuperscript{22} One of these definitions relates to incapacity to handle one's personal affairs that will be handled by a guardian, and the other definition relates to incapacity to handle one's estate and financial affairs that will be handled by a conservator.\textsuperscript{23} According to the statutory definition, a person is “incapacitated” if either of these alternative tests are met.\textsuperscript{24} But, one asks in the hypothetical, if X's incapacity relates only to personal affairs, should this authorize others to enter X's safe-deposit box and withdraw X's business power of attorney? Or if X's incapacity relates only to financial affairs, should this authorize others to enter X's safe-deposit box and remove X's medical power of attorney? Although none of the matters mentioned herein is of overwhelming significance, it is nevertheless submitted that this well-

\textsuperscript{18} Id. When dealing with a will, one presumes that “court clerk” refers to the clerk of the court that has jurisdiction to probate the decedent’s will and thereby make it an effective legal document, and that an “interested” person is one who has a potential property interest in the decedent’s estate. However, it is unclear to whom these terms refer when dealing with a power of attorney, although the latter would certainly include the primary agent named therein.

\textsuperscript{19} Id. § 6.1-332.1(A) (Cum. Supp. 2002).

\textsuperscript{20} The primary agent named therein would be the obvious, but not necessarily the exclusive, possibility.

\textsuperscript{21} Id. § 6.1-332.1(C).

\textsuperscript{22} “Incapacitated person” is defined as:

[An adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his or her support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.

\textsuperscript{23} Id. § 37.1-134.6 (Cum. Supp. 2002).

\textsuperscript{24} See id.
intentioned statute should be clarified in the 2003 Session, at which time the General Assembly might also consider providing for access to another document sometimes placed in a person’s safe-deposit box, a “living will.”

There is a further problem tangentially raised by this statute that has been mostly in the background for some time now, but which needs to be addressed by the General Assembly if this statute is to continue in existence. It is generally assumed throughout the law that no legal rights or relations are created under any document until it is delivered by its author. Yet, this 2002 legislation appears to be drafted on the assumption that a power of attorney received by the agent named therein would be effective even though it was never delivered by the principal and even though it is not received by the agent until a point when the principal, due to incapacity, is legally incapable of making delivery. In order to avoid this delivery problem in practice, many attorneys advise their clients who are unwilling for whatever reason to make an immediate delivery of a power of attorney to the chosen agent, to make a delivery instead to a third party, in escrow, with the escrowee to make physical delivery to the agent upon the occurrence of facts or circumstances stipulated by the principal. But anecdotal evidence and the circumstances that gave rise to the introduction of the legislation under consideration indicate that many persons retain personal possession of their powers and thus the delivery problem is broader than the scope of the present statute. For instance, this statute will have no operation in those cases where there is a co-lessee who makes the document available to the agent, or in the cases where the incapacitated person keeps the power of attorney at the home or office where it is discovered, following the principal’s incapacity by those who are cleaning up. Thus any remedial legislation that addresses the delivery issue only in the limited context of safe-deposit cases will miss the major problem areas.

25. As stated by the Supreme Court of Mississippi:

\[\text{As between the parties, the principal and the purported attorney-in-fact, all that is requisite to the enforceability of the power of attorney is execution and delivery in the same sense that, as between grantor and grantee, all that is necessary for a deed to be valid and enforceable is that the grantor execute it and deliver it.}\]


C. Incorporation by Reference—Worthless Statute Retains Status Quo

The 2001 Session of the General Assembly added Virginia Code section 64.1-45.2, titled "Incorporation by reference; letter of instruction or memorandum into a will, power of attorney or trust instrument." An analysis of this confused and confusing legislation in these pages last year concluded that it: (1) made no positive contribution to Virginia law; and (2) created negative federal income and estate tax consequences for the settlors of irrevocable inter vivos trusts. In order to eliminate these federal tax problems, the 2002 Session amended this statute to provide that no provision incorporated thereunder "is enforceable if... it alters the possession or enjoyment of trust property or the income therefrom as directed by the trust instrument." This legislation also proclaims "[t]hat the provisions of this act are declaratory of existing law"—a statement that the General Assembly makes, on occasion, to indicate that an enactment is a clarification of a statute, or a codification of a common law rule, as opposed to a change in the law. Notwithstanding the elimination of the federal tax problems, the fact remains that this misbegotten statute makes no positive contribution to Virginia law; it has the potential to lead some attorneys into error and should therefore be repealed.

D. Probate Avoidance—Small Estates

The Virginia Code contains a number of statutes designed to facilitate the transfer of specific kinds of property from the dead to the living without requiring the recipients to go through the probate process. These statutes are permissive in nature. Although they fully protect the transferor who elects to rely upon

27. Id. § 64.1-45.2 (Cum. Supp. 2001).
29. VA. CODE ANN. § 64.1-45.2(B) (Repl. Vol. 2002).
31. When the meaning of the term, "declaratory of existing law," was before the Court of Appeals for the Fourth Circuit, it stated that "[w]hile the legislature can only make law and cannot declare what the existing law is, the statement by the General Assembly clearly evidences an intent for the statute to be applied retroactively." Estate of Ridenour v. Comm'r, 36 F.3d 332, 335 (4th Cir. 1994).
them, the potential transferee cannot force their use. A further common denominator in most of these statutes prior to July 1, 2001 was a requirement that the value of the property in question not exceed $10,000. However, the 2001 Session of the General Assembly increased this ceiling to $15,000 in six instances, and the 2002 Session increased it in three more: (1) deposits in banks; (2) deposits in savings institutions; and (3) deposits in credit unions.

E. Small Estates—Waiver of Inventory and Settlement

Prior to July 1, 2001, Virginia Code section 26-12.3, designed to facilitate the probate process in small estates, provided that "[w]hen an estate does not exceed $10,000 in value, and an heir, beneficiary or creditor whose claim exceeds the value of the estate seeks qualification, the clerk shall waive inventory under § 26-12 and settlement under § 26-17." An attempt by the 2001 Session to clarify the meaning of the word "estate" in this section resulted in the introduction of significant ambiguity into its operation. The 2002 Session corrects all of these interpretation problems and also increases the section’s ceiling to $15,000.

F. Small Estate—Triennial Accounts

Virginia Code section 26-17.3 is the general statute requiring fiduciaries governed by Chapter 2 of Title 26 to account before their jurisdiction’s commissioner of accounts for all receipts and

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32. These instances are noted in Johnson, supra note 28, at 855.
37. These problems created by the 2001 amendments are noted in Johnson, supra note 28, at 860–61.
38. VA. CODE ANN. § 26-12.3 (Cum. Supp. 2002). The complete text of this section now reads as follows:

When a decedent's personal estate passing by testate or intestate succession does not exceed $15,000 in value and an heir, beneficiary or creditor whose claim exceeds the value of such estate seeks qualification, the clerk shall waive inventory under § 26-12 and settlement under § 26-17.3. This section shall not apply if the decedent died owning any real estate over which the person seeking qualification would have the power of sale.

Id.
disbursements during each accounting period. The initial accounting period: (1) for a conservator, guardian of a minor's estate, committee, and trustee under Virginia Code section 37.1-134.20 is the first four months following qualification; (2) for a personal representative is the first twelve months following qualification; and (3) for a testamentary trustee required to account is the remainder of the calendar year in which the trust was funded. Thereafter, all of these fiduciaries have an obligation to account annually so long as they remain in office.

In order to reduce the annual accounting burden on small estates, Virginia Code section 26-20 has given commissioners of accounts the discretion to allow fiduciaries listed in Virginia Code section 26-17.3 to account on a three-year basis if their estates do not exceed $10,000. The 2002 Session increased this ceiling to $15,000. Although not a part of the 2002 legislation (except for the increased ceiling), it is interesting to note that notwithstanding the varying periods established for initial accounts noted above, Virginia Code section 26-20 provides that the initial accounting period for all fiduciaries listed in Virginia Code sec-

42. Subject to certain limitations, a testamentary trustee's obligation to account may be waived by the testator or by the trust's adult beneficiaries. See id. § 26-17.7 (Repl. Vol. 2001).
43. Id. § 26-17.6(A) (Repl. Vol. 2001). There are two exceptions to this rule: (1) when at least one of the trustees is a corporation qualified under Virginia Code section 6.1-5; and (2) when at least one of the trustees is permitted by the IRS to file income tax returns on a fiscal year basis, then the trustees may elect to file their initial account for the period of the trust's first "fiscal year." Id. § 26-17.6(C).
44. This annual period is expressed: (1) for a conservator, guardian of a minor's estate, committee, and trustee under Virginia Code section 37.1-134.20 as "each succeeding twelve-month period," id. § 26-17.4(B) (Repl. Vol. 2001); (2) for a personal representative as "each succeeding twelve month period," id. § 26-17.5(B) (Repl. Vol. 2001); and (3) for a testamentary trustee required to account as "each calendar year thereafter," id. § 26-17.6(A) (Repl. Vol. 2001); except for three categories of such trustees who may elect, instead, each succeeding "fiscal year:" (a) trustees who qualified prior to July 1, 1993 and elected to operate on a fiscal year basis, id. § 26-17.6(B); (b) trustees who qualify at any time, one of which is a corporation qualified under § 6.1-5, id. § 26-17.6(C); and (c) trustees permitted by IRS to file income tax returns on a fiscal year basis, id.
46. Id. § 26-20.
tion 26-17.3 is one year if their fiduciary estate does not exceed $15,000.47

G. Notice in Probate—Enforcement

In response to Fourteenth Amendment Due Process issues raised by the Virginia Bar Association, and its lobbying efforts over a five-year period, the 1993 Session of the General Assembly enacted Virginia Code section 64.1-122.2 to provide for after-the-fact notice to certain interested parties within thirty days following the ex parte probate of a will in a testate case or the qualification of an administrator in an intestate case.48 However, although the statute has provided that the "personal representative or proponent of the will shall record in the clerk's office" an affidavit describing to whom, where, and when this notice was sent (or that no notice was required), the statute has contained no time frame or enforcement provisions in connection therewith.49 The 2002 Session remedied these deficiencies by amending Virginia Code section 64.1-122.2 to provide that the affidavit must be recorded "within four months" and, absent compliance, "the Commissioner of Accounts shall issue, through the sheriff or other proper officer, a summons to such fiduciary requiring him to comply and if he shall not, the Commissioner shall enforce the filing of the affidavit in the manner set forth in § 26-13."50

47. The statute reads as follows: "If the principal sum held by any fiduciary mentioned in § 26-17.3 does not exceed $15,000, such fiduciary shall exhibit his accounts before the commissioner within four months after the expiration of one year from the date of the order conferring his authority as provided in § 26-17.3 . . . ." Id.


49. VA. CODE ANN. § 64.1-122.2(F) (Rep. Vol. 2002). The statute's provision that "[a] commissioner of accounts shall not approve any settlement filed by a personal representative until the affidavit described in this subsection has been recorded" did serve as an indirect enforcement provision in some cases. Id. However, as Virginia Code section 26-17.5 provides that a personal representative's first settlement is not due in the commissioner's office until sixteen months after the personal representative's qualification, this sixteen-month enforcement provision for a thirty-day notice was a classic illustration of "too little, too late." Id. § 26-17.5 (Repl. Vol. 2001).

50. Id. § 64.1-122.2(F) (Rep. Vol. 2002). The concluding phrase, "in the manner set forth in § 26-13," refers to the enforcement of a recalcitrant fiduciary's duty to file an inventory by reporting the matter to the circuit court for further action as described therein. Id.
H. *Presumption of Death—September 11th Exception*

Virginia Code section 64.1-105, dealing with the presumed death of a person who has not been heard from for a period of seven years, requires an unnecessarily long wait in some instances where it is reasonable to assume that one has in fact died at an earlier time.\(^{51}\) Thus, the General Assembly has passed specific and general exceptions to this seven-year rule to cover some of these cases.\(^{52}\) The 2002 Session added a new exception, passed as emergency legislation effective February 28, 2002,\(^{53}\) as follows:

1. Presumption of death exception.

   A. Notwithstanding the provisions of § 64.1-105 of the Code of Virginia, any person (i) who has been documented to have been in that portion of the Pentagon damaged by the terrorist attack of September 11, 2001, or on American Airlines Flight 77 on September 11, 2001, when it was flown into the Pentagon; (ii) who has disappeared as a result of this terrorist attack and has not been heard from in three or more months since such terrorist attack; and (iii) whose body has not been found or whose remains have not been identified through scientific testing shall be presumed dead in any instance or cause in which his death shall be a question. The provisions of Chapter 5 (§ 64.1-105 et seq.) of Title 64.1 shall apply to such person, his alleged heirs, devisees, legatees, and next of kin.

   B. Upon petition to the Circuit Court of Arlington County by any heir, devisee, legatee, or next of kin or executor or administrator of such person's estate, the court, upon good cause shown, may find that such person is deceased and issue an order of the court declaring that such person is deceased.\(^{54}\)

Although this special legislation will be very helpful to the successors in interest of those who are believed, but cannot be

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51. See id. § 64.1-105 (Repl. Vol. 2002).
52. See, e.g., id. § 64.1-105.1 (Repl. Vol. 1995) (dealing with cases of persons disappearing in floods resulting from Hurricane Camille); id. § 64.1-105.2 (Repl. Vol. 1995) (dealing with persons disappearing from a ship or vessel at sea or on board an aircraft which disappears at sea).
54. Id. cl. 1. This legislation was passed as “§ 1,” and it will not be codified in the Virginia Code. However, the text of this provision does appear in an editor's note appended to Virginia Code section 64.1-105 (Repl. Vol. 2002).
proven, to have lost their lives in the two terrorist attacks described therein, it makes no provision for the successors in interest of those who may have similarly perished in the other two terrorist attacks that occurred on the same day—the destruction of the World Trade Center in New York and the crash of United Airlines Flight 93 in Pennsylvania. It is possible that one or more Virginians, and/or one or more non-Virginians owning property in Virginia, may have died in one of these two non-covered tragedies without there being any traditional evidence thereof, and it is submitted that an exception from the seven-year rule should be available to their successors in interest in Virginia courts. However, it is suggested that the 2003 Session abandon the practice of drafting to respond to unique fact situations and instead draft a “generic tragedy” statute that would avoid for future incidents a secondary problem presented by the 2002 legislation—the legislative time-lag. In addition to not responding to the needs of all September 11th-affected persons, it was more than five months after September 11th before the 2002 “specific tragedy” legislation provided any assistance for those to whom it was applicable. But, if the 2003 Session should enact a “generic tragedy” exception to Virginia’s seven-year rule, then it will remedy the 2002 deficiency and the successors in interest of those who lose their lives in any terrorist attack, natural disaster, or other tragedy, under circumstances where orthodox proof of death is unavailable, will be able to seek a judicial determination of death forthwith, instead of having to await the convening of the following Session and the passage of special legislation before the process can begin.

55. The traditional seven-year rule of section 64.1-105 not only operates “internally,” it also covers Virginians who disappear out-of-state as well as non-Virginians who have disappeared leaving property in Virginia. VA. CODE ANN. § 64.1-105 (Repl. Vol. 2002).

56. By way of illustration, New York’s generic tragedy exception to its three-year presumption of death rule provides that “[t]he fact that such person was exposed to a specific peril of death may be a sufficient basis for determining at any time after the exposure that he or she died less than three years after the date his or her absence commenced.” N.Y. EST. POWERS & TRUSTS LAW § 2-1.7(b) (McKinney 2002). The parallel statute in Pennsylvania provides that “[t]he fact that an absentee was exposed to a specific peril of death may be a sufficient ground for finding that he died less than seven years after he was last heard of.” 20 PA. CONS. STAT. § 5701(c) (2002).

I. Fiduciary Accounts—Payment of Taxes

The 2002 Session of the General Assembly attempted to clarify the operation and synchronization of several code sections designed to insure that fiduciary estates satisfy tax obligations owed to any unit of government. First, Virginia Code section 58.1-911 was amended to prohibit the commissioner of accounts from approving a personal representative’s final account unless the commissioner determines that: (1) all state, city, or county taxes “assessed and chargeable upon property in the hands of a personal representative”; and (2) any Virginia estate tax and interest “imposed on the property by this chapter” has been paid. 58

Second, Virginia Code section 58.1-22 was amended to prohibit the commissioner of accounts from filing a report on the final account of any fiduciary other than a personal representative, or an interim account of any fiduciary, unless the commissioner determines: (1) that all state, city, or county taxes “assessed and chargeable upon property in the hands of” the fiduciary have been paid; or (2) that an amount sufficient to pay all charges of administration and all taxes “charged against such person in his capacity as fiduciary” remains in the fiduciary’s hands. 59

In addition to the internal interpretation issues mentioned in the footnotes, one wonders why Virginia Code section 58.1-911 operates by prohibiting the commissioner from approving a final

58. VA. CODE ANN. § 58.1-911 (Cum. Supp. 2002) (emphasis added). The standard rule of construction would say that the antecedent of “the property” in the second portion of this statute would be “property in the hands of a personal representative” in the first portion. Such an interpretation would mean that the commissioner’s responsibility under this statute would not extend to that portion of the Virginia estate taxes levied on non-probate property (e.g., insurance payable otherwise than to the estate, survivorship property, etc.), or on property passing through the probate process but not “in the hands of” the personal representative, i.e., real property not devised to the personal representative which will have vested in the heirs (in an intestacy) or devisees (in a testate case). However, as such a result clearly could not have been intended, the commissioners charged with implementing this section will undoubtedly read the words “on the property” out of the clause “tax imposed on the property by this chapter” and apply the clause as if it simply read “tax imposed by this chapter.” Id. The “chapter” referred to in the clause “tax imposed on property by this chapter” is chapter 9, “The Virginia Estate Tax.” Id. §§ 58.1-900 to -938 (Repl. Vol. 1997 & Cum. Supp. 2002).

59. Id. § 58.1-22 (Cum. Supp. 2002) (emphasis added). Although the two parts of this statute are stated in the alternative, it appears that they do not cover all possible cases. For example, real estate taxes levied against property an incapacitated person owns in survivorship with another would not be property “in the hands of” the conservator, and the taxes thereon would not be “charged against the conservator” in his fiduciary capacity. See id.
account, but Virginia Code section 58.1-22 operates by prohibiting the commissioner from filing a report on an account. As written, Virginia Code section 58.1-911 permits the commissioner to disapprove a personal representative’s final account and file a report with the court.60 Virginia Code section 58.1-22 prohibits the commissioner from filing a report on interim accounts made by any fiduciary, including a personal representative, and on final accounts when made by any fiduciary other than a personal representative.61 One wonders why the commissioner shouldn’t be allowed to disapprove a deficient interim or final account and file a report thereon with the court in these other cases? Lastly, in this non-exhaustive list of questions, what about real estate taxes assessed against a person that were unpaid at death and remain unpaid at the time an administrator files a final account with the commissioner showing a zero balance on hand? Virginia Code section 58.1-22 is not applicable because it applies only to fiduciaries “not governed by § 58.1-911,”62 and that section governs the “final account of a personal representative.”63 But Virginia Code section 58.1-911 fails to provide a remedy because the real estate taxes on intestate realty are not “assessed and chargeable upon property in the hands of a personal representative.”64 Although none of the issues raised in connection with these two code sections are likely to present a major problem in their practical application by the commissioners of accounts, they are, nevertheless, significant enough to warrant a revisit thereto in the 2003 Session.

J. Probated Will—Destruction after Microfilming

Virginia Code section 17.1-213, dealing with the disposition of papers in ended cases, was amended by the 2002 Session to add “original wills” to the list of papers that circuit court clerks are permitted to destroy, after they have been microfilmed, if they “no longer have administrative, fiscal, historical, or legal value to warrant continued retention.”65

60. Id. § 58.1-911 (Cum. Supp. 2002).
62. Id.
63. Id. § 58.1-911.
64. Id.
K. Charitable Corporations—Jurisdiction—Attorney General’s Enforcement Authority

The 2002 Session enacted two statutes to overrule the holdings of the Supreme Court of Virginia, in Commonwealth v. JOCO Foundation: 66 (1) that the Attorney General of Virginia had no authority to enforce public charities operating as non-profit corporations; and (2) that exclusive jurisdiction for such enforcement was vested in the State Corporation Commission. 67 After an opening preamble that does no more than state present law, 68 the first statute gives the Attorney General “the same authority to act on behalf of the public with respect to such assets [of a charitable corporation] as he has with respect to assets held by unincorporated charitable trusts and other charitable entities . . . “69 The second statute grants unto the circuit courts “the same subject matter jurisdiction over matters pertaining to assets of charitable corporations, incorporated in or doing any business in Virginia, as the circuit courts have with respect to assets held by unincorporated charitable trusts and other charitable entities . . . .”70

III. DECISIONS OF THE SUPREME COURT OF VIRGINIA

A. Missing Wills—Revoked or Lost

The primary issue in Johnson v. Cauley 71 was whether a will and two codicils that could not be found at testator’s death “were in the possession of the drafting attorney and were inaccessible to the testator, giving rise to a presumption that the documents were lost, not revoked.”72 In regard to the accessibility issue, ap-

67. See discussion infra Part III.F.
68. “The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the donor’s intent as expressed in governing documents or by other applicable law.” VA. CODE ANN. § 2.2-507.1 (Cum. Supp. 2002).
69. Id.
70. Id. § 17.1-513.01 (Cum. Supp. 2002).
72. Id. at 42, 546 S.E.2d at 683. A well-settled rule applicable to a missing will holds that it will be presumed to have been revoked if it was last in testator’s possession and that it will be presumed to have been lost if it was last in the possession of another and not accessible to testator. Id. at 43, 546 S.E.2d at 683.
pellant contended that testamentary documents left in a drafting attorney's custody, "obviously are accessible to clients" and, absent testimony from the custodial attorney of loss, destruction, or delivery to testator, "a testator must be considered to have access to the documents." As the drafting attorney predeceased testator in this case, adoption of appellant's argument would necessarily preclude a presumption that the testamentary documents were lost. Although the Supreme Court of Virginia recognized that appellant's definition of access "reflects the legal right of the testator to retrieve her documents," it concluded that it "does not address the practical acts necessary to access testamentary documents for purposes of revoking them or reasserting physical control over them." After examining the disputed facts relating to these "practical acts," the court affirmed the trial court's decision that the testator did not have access to the will and codicils.

B. Joint Bank Account—Unilateral Addition of Additional Party

The issue in *Caine v. NationsBank* was "whether a financial institution breached its statutory or contractual duties when it allowed one party to a joint account to add unilaterally another party to the account." Almost ten years prior to his death, father ("F") executed with daughter ("D") the requisite signature card at NationsBank ("Bank") to open a joint checking account with survivorship. In the month of his death, F and his wife ("W") executed a new signature card that Bank recognized as sufficient to make W a party to F and D's joint account. D's action against Bank to recover the $100,181.13 in checks written on this account by W was decided against D on Bank's demurrer, with the trial court "holding that Code § 6.1-125.6 authorized the 'unilateral addition of a new owner to a multiple-party account.'" Although

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73. *Id.* at 45, 546 S.E.2d at 684.
74. *Id.* at 42, 546 S.E.2d at 683.
75. *Id.* at 45, 546 S.E.2d at 684.
76. *Id.* at 47, 546 S.E.2d at 685–86.
77. 262 Va. 312, 551 S.E.2d 653 (2001).
78. *Id.* at 315, 551 S.E.2d at 654.
79. *Id.*
80. *Id.*
81. This total included a check for $75,000 that was "written, cashed, and deposited" to W's account on the day of F's death. *Id.*
82. *Id.*
the Supreme Court of Virginia held that the trial court correctly rejected D's argument that the provisions of Virginia Code section 6.1-125.6 authorized one party to change the "form" of an account related only to survivorship rights, it also held that the trial court erred in ruling that this section "authorized" the account change in question. Referring to its recent decision in Jampol v. Farmer, the court reiterated that the language of Virginia Code section 6.1-125.6 "referring to a unilateral change in the account form was not the source of that authority [to alter the form of an account], but rather one means of exercising such authority." However, the court stated that the governing contract in this case provided in part that "[e]ach owner appoints all other owners as his or her agent to endorse, deposit, withdraw and conduct business for the account." In addition, the court quoted from Virginia Code section 6.1-125.15.1 that "each party to an account acts as 'agent in regard to the ownership interest of the other party.'" Rejecting D's claim that the contractual language, to "conduct business for the account," related only to ministerial or transactional matters, the court responded that it was "sufficiently broad so as to include the ability of one party to the account to act as the agent of the other parties [sic] to the account when adding a new party to the account." Accordingly, the court "conclude[d] that the bank did not breach its contract with [D] in

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83. This section of the Virginia Code provides that:

the provisions of § 6.1-125.5 as to rights of survivorship are determined by
the form of the account at the death of a party. This form may be altered by
written order given by a party to the financial institution to change the form
of the account or to stop or vary payment under the terms of the account. The
order or request must be signed by a party, received by the financial institu-
tion during the party's lifetime, and not countermanded by other written or-
der of the same party during his lifetime.


84. Caine, 262 Va. at 316–17, 551 S.E.2d at 655.

85. 259 Va. 53, 524 S.E.2d 436 (2000). The court in Caine noted that "the trial court's
holding was rendered less than one month after the decision in Jampol and the case was
not discussed or cited by either the parties or the court." Caine, 262 Va. at 316 n.3, 551
S.E.2d at 655, n.3. For a discussion of Jampol, see J. Rodney Johnson, Annual Survey of

86. Caine, 262 Va. at 317, 551 S.E.2d at 655.

87. "The contract between the bank and the parties to the joint account in this case
consists of the Retail Signature Card and the Rules and Regulations Governing Retail Ac-
counts." Id.

88. Id.

89. Id. at 318, 551 S.E.2d at 656 (quoting VA. CODE ANN. § 6.1-125.15:1 (Repl. Vol.
1999)).

90. Id. at 319, 551 S.E.2d at 656.
recognizing [W] as a party to the joint account based on the signature card executed by [F].”

Although not disagreeing with the outcome in this case, one wonders why it was decided on the basis of F serving as D's agent. The contract provision the court relied upon stated that “each owner appoints . . .” But, although D was a “party” to the account, she was clearly not an “owner” under Virginia law and may not have been an “owner” under the referenced portion of the contract between D, F, and Bank. Moreover, even if F was authorized to act as D's agent, there is nothing in the opinion to indicate that F verbally claimed to be acting as D’s agent when F executed the new signature card, and the signature card itself contains nothing to indicate such an intent. It is respectfully submitted that, in the absence of a statute or contract provision clearly governing this case, the court could have simply and more directly concluded that, as F was the undisputed sole owner of this account, he did not require D’s consent to add another party thereto. Such an analysis would also: (1) promote the cause of

91. Id.
92. Id. at 317, 551 S.E.2d at 655 (emphasis added).
93. The term “party” is defined as meaning “a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.” VA. CODE ANN. § 6.1-125.1(7) (Repl. Vol. 1999).
94. Although it is not clear from the court’s opinion, it is an “uncontested” fact in the trial court’s opinion letter, Opinion Letter of the Honorable F. Bruce Bach at 54, Caine (No. 002615), and admitted in the briefs of appellant (Brief of Appellant at 9, Caine (No. 002615)), and appellee (Brief of Appellee at 15, Caine (No. 002615)) that F made all of the contributions to this account, and Virginia Code section 6.1-125.3(A) states that “[a] joint account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each to the sums on deposit . . ..” VA. CODE ANN. § 6.1-125.3(A) (Repl. Vol. 1999) (The remainder of this subsection provides: “Except that a joint account between persons married to each other shall belong to them equally, and unless, in either case, there is clear and convincing evidence of a different intent.”). Therefore, as D made no contributions to the account, she had no ownership interest therein.
95. An examination of the contract between the parties shows the Retail Signature Card referring to the participants (to use a neutral term) as “customers” and the Rules and Regulations Governing Retail Accounts referring to “owners” or “persons” or “depositors” without defining any of these terms. See Retail Signature Card at 16, 19, Caine (No. 002615); Rules and Regulations Governing Joint Accounts at 7, Caine (No. 002615). The standard rule for construing ambiguities in a contract of adhesion calls for them to be resolved against the one who prepared the contract.
96. See Retail Signature Card at 19, Caine (No. 002615).
97. The Official Comment to pre-1989 Uniform Probate Code section 6-103, which is the source of Virginia Code section 6.1-125.3, provides general support for the suggested conclusion as follows:

The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective depos-
uniformity as similar issues arise in other financial institutions; and (2) eliminate the need to peruse each institution's otherwise unique account cards and regulations which, experience suggests, are seldom read and less often understood by their customers.

C. Holographic Will—Sufficiency of Signature

In *Kidd v. Gunter*, 9 decedent left a bound journal containing an admitted testamentary writing which, though entirely in decedent's hand, did not have a signature at its end. 9 However, proponents of the writing argued that the decedent's writing of this name in a pre-printed box on the inside cover of her journal satisfied the signature requirement of Virginia Code section 64.1-49. 10 Although this section does not require a will to be signed at the end, and a testator's name written in a document's title or opening sentence has been found sufficient thereunder, "it must appear unequivocally from the face of the writing' that the person's name therein is intended as a signature." 10

Following an examination of the undisputed facts in this case, the court concluded that "[n]o affirmative evidence on the face of the journal demonstrates that [decedent] intended her signature in that box to be her signature to the will," and thus it affirmed the trial court's denial of probate. 10

100. *Id.* at 448, 551 S.E.2d at 649. Ironically, the first sentence decedent wrote in her journal was "[t]his journal has been set up to eliminate problems for my family at the time..."
D. Disinterment—Reburial—Standing of Former Spouse

The issue in *Grisso v. Nolen* was whether the trial court erred in holding that a divorced man had standing to petition for the "disinterment and reburial of his former wife's body." Husband ("H") and wife ("W") were divorced after thirty-eight years of marriage, but they cohabited intermittently until W's death intestate six years later. As W had made no final arrangements of her own, "the proper determination of the place of her burial rested with her personal representative, her surviving spouse, or her next of kin." D, who was H and W's daughter and W's next of kin, made the arrangements for W's interment. Six months thereafter H brought his petition to assert W's alleged expressed wish regarding the disposition of her body, which the trial court ruled he had standing to bring because, although he was "legally a stranger to [W], in fact he is not." On appeal, H further argued "he had standing because the suit was not adversarial in nature, but was brought 'in rem' in order to permit the court to determine and give effect to [W's] wish regarding her final resting place." The Supreme Court of Virginia rejected this "novel premise" and held that, as their divorce made H and W legal strangers, H "had no cognizable interest in the place of her burial and, thus, no standing to seek the disinterment of her body for reburial."
E. Oral Waiver—Augmented Estate—Spousal Allowances

The issue in *Flanary v. Milton* was the validity of an oral, post-marital property agreement. On the day preceding H's death, and while his deposition was being taken in the divorce proceeding between H and W, "an oral agreement between the parties was recited into the record by the parties' attorneys," the provisions of which W agreed would constitute "a full and final settlement of all rights accrued by virtue of this marriage." When W subsequently petitioned for spousal allowances and an elective share in H's augmented estate, the trial court ruled "that the oral agreement was valid and effectively released" these rights. Post-marital contracts are governed by Virginia Code section 20-155, which provides that they are "subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses," and Virginia Code section 20-149 requires a pre-marital agreement to be in writing and signed by the parties. The executor of H's estate claimed exemption from these requirements, relying on *Richardson v. Richardson*, in which the Virginia Court of Appeals held that "compromises and settlement agreements to pending litigation which incidentally include issues of property and spousal support' are not within the purview of [Virginia] Code § 20-155 and, thus, do not need to comply with the requirement that such agreements be in writing." However, the supreme court responded that "[s]tatutes must be read according to their plain meaning, giving effect to the language that the legislature chose to use . . . [and that] nothing in the language of [Virginia] Code § 20-155 exempts from its application a property . . . agreement made in contemplation of resolving a pending divorce action." Accordingly, the
court "reject[ed] the Executor's arguments and the rationale and holding of Richardson upon which he relies," and reversed the trial court's decision.122

F. Charitable Corporations—Subject Matter Jurisdiction

In Commonwealth v. JOCO Foundation,123 a divided Supreme Court of Virginia affirmed the trial court's holding that exclusive jurisdiction for the regulation of public charities operating as non-profit corporations was vested in the State Corporation Commission.124 This four-to-three decision was overruled, prospectively, by the 2002 Session of the General Assembly.125

G. P.O.D. T-Bills and CD—Ownership—Burden of Proof—Federal Preemption

The issues before the court in Beeton v. Beeton,126 involved the ownership of: (1) a certificate of deposit ("CD") in a local bank, worth approximately $200,000, on which Decedent ("D") had listed Son ("S") as the payable on death ("P.O.D.") beneficiary and which S had re-issued as a joint certificate with survivorship prior to D's death; and (2) two U.S. Treasury Bills, in the amount of $1,000,000 and $250,000, on which S was the P.O.D. beneficiary at D's death.127 In regard to the $200,000 CD, the Supreme Court of Virginia agreed with plaintiffs that the re-issued certificate was void because only a "party" could make such a change and S, as a P.O.D. beneficiary, was not a party during D's lifetime.128 However, the court rejected plaintiffs' contention that S's

122. Flanary, 263 Va. at 23, 556 S.E.2d at 769.
123. Id. at 151, 558 S.E.2d 280 (2002).
124. Id. at 160, 558 S.E.2d at 284.
125. See VA. CODE ANN. § 17.1-513.01 (Cum. Supp. 2002); VA. CODE ANN. § 2.2-507.1 (Cum. Supp. 2002). This legislation is noted supra Part II.K.
127. Id. at 334-35, 559 S.E.2d at 666.
128. Id. at 337, 559 S.E.2d at 668. Chapter 2.1 of Title 6.1, entitled "Multiple Party Accounts," provides that: (1) a CD is an account; (2) the form of an account may be altered by a party; and (3) "a P.O.D. payee... is a party only after the account becomes payable to
re-issuance actions rendered the original CD invalid and that the proceeds of this account should therefore be paid to D's estate. Instead, the court concluded that, as S's re-issuance actions were ineffectual, the original CD, "which designated [S] as the P.O.D. beneficiary, remained in effect at [D's] death."

D's account with the U.S. Treasury containing the two P.O.D. T-bills in issue also included a third T-bill, in the amount of $200,000, on which S was also the P.O.D. beneficiary; and, according to S, all three of these P.O.D. designations were made by him at D's direction. S testified that, while assisting D to renew other T-bills, they "ran across a bill that did not have a P.O.D. on it. She told [him] that she would like to place a P.O.D. on it," and asked him to obtain the necessary form. S further testified that he completed this form at D's direction, thinking that the account number she furnished him related only to the $200,000 T-bill, and not discovering the existence of the $1,000,000 and $250,000 T-bills in the account until after D's death. The chancellor concluded that the evidence failed to disclose any intent on D's part to make S the P.O.D. beneficiary of the $1,000,000 and $250,000 T-bills and thus awarded them to D's estate. The court began


129. Beeton, 263 Va. at 337, 559 S.E.2d at 668.
130. Id. at 333, 559 S.E.2d at 666. The chancellor found that D was competent at the time of the changes and that the changes were not the result of S's fraud or undue influence. Id. at 334, 559 S.E.2d at 666. No appeal was taken from this portion of the chancellor's opinion.
131. Id. at 333, 559 S.E.2d at 665.
132. Id. at 333, 559 S.E.2d at 665–66. When questioned further about his conversation with D concerning the addition of a P.O.D. designation, S testified:

"At that time she indicated that she wanted to put a P.O.D. on the account."

However, when questioned why D wanted to make the P.O.D designation, S also stated, "From her conversation she just indicated to me considering the way things are going I would like to place a P.O.D. on that bill."

S also testified that when D instructed him to list himself as the P.O.D. beneficiary on the Transaction Request Form, she commented to S, "That's a lot of responsibility."

Id. at 333, 559 S.E.2d 665–66.
133. Id. at 334, 559 S.E.2d at 666. The chancellor also based his opinion on the evidentiary rule found in Massie v. Firmstone, 134 Va. 450, 462, 114 S.E. 652, 656 (1922), holding that S "was bound by his testimony that before his mother's death, he thought that her intent was to have the added P.O.D. designation apply only to the $200,000 Treasury Bill."

Beeton, 263 Va. at 334, 559 S.E.2d at 666. The court held that the chancellor erred in his application of the Massie doctrine, which "is limited to sworn statements of fact within a litigant's own personal knowledge and . . . does not apply to a litigant's statement of opinion." Id. at 336–37, 559 S.E.2d at 667.
its resolution of the intent issue by stating that these T-bills were
contained in a “Treasury Direct” account opened by D with the
United States Department of the Treasury and that it would treat
“this particular account as an ‘account’ within the meaning of
[Virginia] Code § 6.1-125.1(1)” under the law of this case as pre-
sented by the parties.\footnote{Id. at 335, 559 S.E.2d 667. The opinion contains a footnote at this point, in which
the court states that:

The parties presented this case at trial and on appeal under the statutory
framework of Title 6.1 of the Code, and neither the parties nor the trial court
considered provisions of federal law relating to the ownership of a Treasury
Direct account or of securities held in such an account. See, e.g., 31 C.F.R.
§ 357.22(c) (2001). Therefore, the provisions of Title 6.1 have become the law
of the case.\textsuperscript{134} Id. at 335 n.1, 559 S.E.2d at 667 n.1.

The parties erred on this point. The cited code section defines an account as "a contract
of deposit of funds between a depositor and a financial institution . . . ." VA. CODE ANN.
institution as "any organization authorized to do business under state or federal laws rela-
ting to financial institutions, including, without limitation, banks and trust companies,
savings banks, building and loan associations, savings and loan companies or associations,
and credit unions." VA. CODE ANN. § 6.1-125.1(3). The United States Department of the
Treasury does not fit within the language or intent of this definition of financial institu-
tion. This conclusion is reinforced by reference to Virginia Code section 6.1-125.2, which
provides in part that "[t]he provisions of §§ 6.1-125.9 through 6.1-125.14 govern the lia-
ribility of financial institutions who make payments pursuant thereto, and their set-off rights."\textsuperscript{135} Id. § 6.1-125.2 (Repl. Vol. 1999). Clearly, the Virginia General Assembly cannot "govern
the liability . . . [and] set-off rights" of the United States Department of the Treasury. Nor
can it require the Treasury Department to participate in the garnishment process, as is
required of a financial institution. Id § 6.1-125.3(D).}

\footnote{Beeton, 263 Va. at 335–36, 559 S.E.2d at 667.}

\footnote{Id. at 336, 559 S.E.2d at 667.}

\footnote{Id.}
to the court under federal law instead of the law of the Commonwealth. The United States Department of the Treasury has adopted regulations dealing with securities held in "Treasury Direct," which provide in part that "[r]egistration of a security conclusively establishes ownership." An appendix to these regulations explains that:

The reason for establishing the rights of ownership for securities held in TREASURY DIRECT is that it will give investors the assurance that the forms of registration they select will establish conclusively the rights to their book-entry securities. It will also serve to eliminate some of the uncertainties, as well as possible conflicts, between the varying laws of the several States.

A Federal rule of ownership is being adopted by the Treasury for TREASURY DIRECT securities. It will have the effect of overriding inconsistent State laws.

One of the registration forms permitted by the federal regulations is "Beneficiary. In the name of one individual followed by the words 'Payable on death to' (or 'P.O.D.' ) another individual," the rules of which correspond to Virginia law governing P.O.D. accounts, with one exception, and the present case involved this exception. Whereas Virginia law, as fleshed out by the court, would allow the form of a P.O.D. account having a sole original

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138. The court noted that no reference to federal authority is made in the brief of either party concerning the ownership issue. Id. at 335 n.1, 559 S.E.2d at 667 n.1; see also VA. CODE ANN. § 20-149 (Repl. Vol. 2000). However, S's brief does refer to D's compliance with federal law in the execution of the transaction request form. Brief of Appellant at 15–16, Beeton (No. 011225).

139. It has already been noted in footnote 128, supra, that the account in this case was not an "account" within the definition of that term contained in Virginia's Multiple Party Account laws. VA. CODE ANN. § 6.1-125.1(1).


141. 31 C.F.R. § 357.21(a)(1). The omitted portion of this sentence creates an exception for "the case of partnership nominees." Id.

142. 31 C.F.R. § 357 App. A (citing Free v. Bland, 369 U.S. 663 (1962)). In Free, the United States Supreme Court answered affirmatively the question of "whether the Treasury Regulations creating a right of survivorship in United States Savings Bonds pre-empt any inconsistent Texas community property law by virtue of the Supremacy Clause, Article VI, Clause 2, of the Constitution." 369 U.S. at 664.

143. 31 C.F.R. § 357.21(b)(2)(iii).

Registration in this form shall create ownership rights in the beneficiary only if the beneficiary survives the owner. During an owner's lifetime, a transaction request may be executed by the owner without the consent of the beneficiary. If the beneficiary dies before the owner, the security will be deemed to be registered in the owner's name alone.

Id.
payee to be contradicted by clear and convincing evidence, federal law holds that the form of a P.O.D. T-bill account is conclusive.\(^{144}\)

**H. Right of First Refusal—Rule Against Perpetuities**

One of the issues before the Supreme Court of Virginia in *Firebaugh v. Whitehead*\(^{146}\) was whether a certain right of first refusal to purchase real estate violated the rule against perpetuities.\(^{146}\) The court correctly stated that such a right “is void ab initio if, at its creation, there is a possibility the right might not be exercised until after the expiration of the time period fixed by the rule, which is measured by a life or lives in being plus 21 years and 10 months.”\(^{147}\) Then, after noting that the right before it “was specifically granted to ‘Charles Whitehead and Martha A. Whitehead, or the survivor,’” the court concluded that “[t]he relevant lives in being at the time of the grant were [Grantor] and the Whiteheads, and the right vested at the time of the execution of the agreement.”\(^{148}\) The court was correct in concluding that the right of first refusal did not violate the rule against perpetuities, but its reasoning was incorrect. The time of *vesting* of the right of first refusal is irrelevant. The true issue, as previously noted by the court, is whether it might be exercised beyond the period permitted by the rule.\(^{149}\) The correct analysis is that, as the right in this case was personal to the Whiteheads,\(^{150}\) it could not be exercised any later than the lifetime of the survivor of them. Thus, as they were both lives in being, it is clear that the right of first refusal could not be exercised beyond the perpetuity period.

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144. 31 C.F.R. § 357.21(a)(1); see also Estate of Scheiner, 535 N.Y.S.2d 920 (N.Y. Sur. Ct. 1988) (focusing on survivorship rights in an joint tenancy). Scheiner appears to be the only case to have considered the supremacy of the Treasury Direct regulations. The court concluded that “[t]he Federal regulations known as Treasury Direct preempted any existing inconsistent State law by mandating that these securities should pass as registered.” Id. at 921.


146. *Id.* at 404, 559 S.E.2d 615. See Cogbill & Keene, *supra* note 105, at 278–80, for a discussion of other issues in this case.

147. *Firebaugh*, 263 Va. at 404, 559 S.E.2d at 615–16.

148. *Id.* at 405, 559 S.E.2d at 616.

149. See *supra* text accompanying note 147.

150. This is not expressly stated in the opinion, but it seems to be fairly implied thereby, and it also appears to be an accurate characterization of the Whiteheads’ right.
I. Augmented Estate and Spousal Allowances—Pre-Nuptial Waiver

The issue in Pysell v. Keck151 was whether a surviving wife's claim to family allowance, exempt articles allowance, and an elective share in her deceased husband's estate was barred by their pre-nuptial contract.152 Applying the standard rules applicable to the interpretation of contracts, a majority of the Supreme Court of Virginia concluded that "[n]owhere in these three paragraphs or elsewhere in the agreement do we find a reference to either party’s rights in the property of the estate of the other."153 Accordingly, the court held that "the trial court erred in entering summary judgment for the executor on this issue," and remanded the case for further proceedings in the trial court.154 The two dissenting justices believed that "[t]he majority has focused entirely on the draftsmanship of the document rather than the intent of the parties."155

J. Constructive Trust—Accounting

In Tauber v. Commonwealth,156 the Supreme Court of Virginia "consider[ed] issues related to an accounting of the assets of a defunct charitable corporation."157 This case is a sequel to a 1998

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152. The portions of this agreement before the court were:
   2. That it is the intention of the parties that each of them shall continue to own as his or her separate property, all of the real, personal or mixed property which they individually own as of this date.
   3. That they may hereafter individually acquire additional property of a similar nature, and it is the intention of the parties hereto that said property shall also be the individual property of the person acquiring the same.
   .
   6. . . . [I]t is the intention and desire of the parties that their respective rights to each other's property acquired by operation of law shall be solely determined and fixed by this agreement.
   Id. at 459, 559 S.E.2d at 678 (alteration in original).
153. Id. at 460, 559 S.E.2d at 679.
154. Id. at 461, 559 S.E.2d at 679.
155. Id. at 463, 559 S.E.2d at 680. The essence of the dissent's rationale is that the agreement expressly provided for the parties lifetime rights in paragraphs two and three and, "[e]xcluding those rights, the remaining rights that could be 'acquired by operation of law' are those that accrue to a surviving spouse." Id. at 464, 559 S.E.2d at 681.
156. 263 Va. 520, 562 S.E.2d 118 (2002) [hereinafter Tauber II].
157. Id. at 525, 562 S.E.2d at 120.
case of the same name\textsuperscript{158} wherein the court “affirmed the chancellor’s judgement imposing a constructive trust on the assets of the [same] defunct charitable corporation.”\textsuperscript{159} \textit{Tauber II} is a lengthy, fact-specific opinion that applies established rules of law to unique facts\textsuperscript{160} prior to affirming in part with final judgment, reversing in part, modifying and final judgment as modified, and remanding.\textsuperscript{161}

IV. UNITED STATES DISTRICT COURT CASE

A. Trust Income Taxation—Deduction for Investment Advice—2% Rule

Investment advisory fees are treated as a “miscellaneous itemized deduction” for federal income tax purposes.\textsuperscript{162} The general rule of I.R.C. section 67 limits the deductibility of such costs to the amount they exceed 2% of a taxpayer’s adjusted gross income—the “two percent rule.”\textsuperscript{163} However, the 2% rule is not applied to estates and trusts regarding costs “which would not have been incurred if the property were not held in such trust or estate.”\textsuperscript{164} In \textit{Scott v. United States},\textsuperscript{165} the trust and its income beneficiaries claimed that the 2% rule should not be applied to the fees paid to the trust’s financial advisor because the responsibilities imposed upon a trustee by Virginia’s “prudent investor” rule create a fiduciary duty on the trustee’s part to seek the assistance of a financial advisor, while individuals investing their own funds clearly have no such obligation.\textsuperscript{166} This argument has been accepted by the Sixth Circuit\textsuperscript{167} and rejected by the Federal Cir-

\begin{thebibliography}{99}
\bibitem{159} \textit{Tauber II}, 263 Va. at 525, 562 S.E.2d at 120.
\bibitem{160} Although the case presented issues involving constructive trusts, commingling, and allowance of attorney fees and costs that serve to lighten the tedium expected in an accounting case, these issues are not discussed herein because they are all resolved by the application of well-settled rules of law.
\bibitem{161} \textit{Tauber II}, 263 Va. at 548, 562 S.E.2d at 133.
\bibitem{162} 26 U.S.C. § 67(a) (2000).
\bibitem{163} \textit{Id.}.
\bibitem{164} \textit{Id.} § 67(e)(1).
\bibitem{165} 186 F. Supp. 2d 664 (E.D. Va. 2002).
\bibitem{166} \textit{See id.} at 666.
\bibitem{167} O’Neil v. Comm’r, 994 F.2d 302 (6th Cir. 1993).
\end{thebibliography}
However, the district court decided it was not necessary to follow either of these two lines of authority because, as Virginia fiduciaries may elect to invest pursuant to Virginia’s “legal list,”169 which immunizes them from any charge that they invested imprudently,170 “a trustee in Virginia is not required to consult a financial advisor to fulfill his statutory obligations.”171 Therefore, according to the court, “[a] trust’s ‘need’ to incur the costs of a financial advisor is no different than the ‘need’ of an individual,” and thus a trust is restricted to the same deduction as an individual, i.e., one subject to the 2% rule.172

B. Burial—Mishandling of Corpse—Next-of-Kin

In Mazur v. Woodson,173 a widower and his adult children (“P”) sought to recover damages for “intentional and negligent mishandling of a corpse under Virginia common law” from the funeral home (“F”) that buried his wife and their mother (“D”), from F’s employee (“E”) who handled D’s funeral service, and from D’s brother (“B”), who had been appointed guardian of D’s person and property in 1994, and who made the arrangements for D’s burial in Virginia following D’s death on July 1, 2001.174 Although P’s state court petition for D’s disinterment and reburial in New Jersey was granted on August 10, 2001 pursuant to a consent decree in which B joined, P alleged in the present case that no notice was given of D’s original burial and that D’s advanced decomposition


169. Virginia’s “legal list” is found in Virginia Code section 26-40.01, which identifies a number of investments under three broad headings: (1) “Obligations of the Commonwealth, its agencies and political subdivisions”; (2) “Obligations of the United States”; and (3) “Savings accounts, time deposits or certificates of deposit” and provides that fiduciaries whose investments are made within these enumerations “shall be conclusively presumed to have been prudent in investing the funds held by them in a fiduciary capacity.” VA. CODE ANN. § 26-40.01(B) (Repl. Vol. 2001).

170. The court stated that “[a]s unfair as it may prove to be to the beneficiaries, a trustee in Virginia may arbitrarily decide to invest one hundred percent of the assets of a trust in United States Savings Bonds and he will be deemed to have met the ‘prudent investor’ standard.” Scott, 186 F. Supp. 2d at 668.

171. Id. The court dismissed plaintiffs’ further argument that “a fiduciary in Virginia owes a duty of ‘impartiality’ over and above the ‘prudent investor’ rule” that would require consultation with a financial advisor, finding that the former is incorporated into the latter. Id.

172. Id. at 669.


174. Id. at 677–78.
at disinterment prevented P from holding “a proper funeral service” for D.77 Notwithstanding P’s assertion of a common law claim against F and E, the court concluded that Virginia Code section 54.1-2807(B) was controlling, that it permitted F and E to bury D’s body upon the authorization of “any” of D’s next of kin, and thus that B was one of D’s “next of kin,”77 it granted F’s and E’s motions to dismiss.78

In connection with P’s claim against B, the court noted that in Virginia “the right to bury and preserve the remains is recognized and protected as a quasi-property right,” and that “an action ex delicto will lie against a wrongdoer for the wrongful invasion of a near-relative’s rights with respect to a dead body . . . or for a breach of duty in respect to it.”79 However the court concluded that such a cause of action is a right in favor of a decedent’s next of kin against a third party, that all of a decedent’s next of kin have equal rights and standing, and that, as B was one of D’s next of kin, “he is not subject to suit from other members of that class for withholding the body from them.”80 It appears that the court may have erred at this point. The chapter of the Virginia Code within which the court’s definition of “next of

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175. Id. at 678.
176. The statute provides that:
   Funeral service establishments shall not accept a dead human body from any public officer except a medical examiner, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body.
177. Chapter 28 of Title 54.1 is titled “Funeral Services.” §§ 54.1-2800 to -2825 (Repl. Vol. 2002.) The “Definitions” section provides in part that:
   As used in this Chapter, unless the context requires a different meaning, . . . “Next of kin” means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent’s remains upon his death pursuant to § 54.1-2825, the legal spouse, child over eighteen years of age, custodial parent, noncustodial parent, siblings over the age of eighteen years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over eighteen years of age and paternal siblings over eighteen years of age, or any other relative in the descending order of blood relationship.
179. Id. (quoting Sanford v. Ware, 191 Va. 43, 48, 60 S.E.2d 10, 12 (1950)).
180. Id. at 682.
kin" is found is entitled "Funeral Services." An examination of
the code sections contained therein suggests that this chapter is
intended to deal solely with the regulation of the funeral indus-
try and that its provisions are not meant to govern controver-
sies between a decedent's relatives or between relatives and third
parties. This analysis is not meant to suggest that P should
necessarily recover any damages from B, only that B is not im-
mune to a claim brought by P simply because B was D's brother,
and that, therefore, P's claim should not have been dismissed.

P's alternative argument against B was based upon the well-
known dicta in Goldman v. Mollen that a "decedent's place of
burial rests with his personal representatives," his widow or his
next of kin. Ordinarily personal representatives are not ap-

182. Id. Chapter 28, "Funeral Services," is divided into five articles: (1) "Board of Fu-
nal Directors and Embalmers"; (2) "Licensure of Funeral Establishments"; (3) "Licen-
sure of the Practice of Funeral Services, Funeral Directors and Embalmers"; (4) "Registra-
tion of Surface Transportation and Removal Services"; and (5) "Preneed Funeral
Contracts." Id. §§ 54.1-2800 to -2825. Virginia Code section 54.1-2807, found in Article (1),
is entitled "Other prohibited activities," and the apparent purpose of its subsection B,
upon which the court correctly relied in dismissing P's claim against F and E, is to prohibit
a funeral service establishment from acting without the consent of some family member—
and not to state the rights of the family members as between themselves.
183. If each member of the class composed of the "next of kin," as broadly defined by
Virginia Code section 54.1-2800, has coequal rights, one wonders how all of the class
members would be identified and how a recovery against a third-party wrongdoer would
be apportioned among them.
185. One who is nominated as executor in a decedent's will has no authority prior to
qualification, "except that he may provide for the burial of the testator, pay reasonable fu-
neral expenses and preserve the estate from waste." VA. CODE ANN. § 64.1-136 (Repl. Vol.
1995).
186. It is clear that Goldman, a 1937 case, was not referring to the same definition of
"next of kin" as was the court in the present case, because the latter's definition was not
added to the Code until 1991. See VA. CODE ANN. § 54.1-2800 (Repl. Vol. 2002). It is also
clear that Golman was using "next of kin" in a wills, trusts, and estates sense and, al-
though one can argue that a different meaning was intended by the Goldman Court in
1937, the most recent definitional statement by the Supreme Court of Virginia holds that
"next of kin" is "a nontechnical term whose commonly accepted meaning is 'nearest in
standing Elmore's 1986 reference to "nearest in blood," one would think that adopted per-
sons are now presumptively included within one's "next of kin" as a result of the 1987
amendments to Virginia Code section 64.1-71.1, "construction of generic terms" (in wills
and trusts), and the 1987 enactment of Virginia Code section 55-49.1, "construction of ge-
pointed until later and so this choice usually is made by the family. As between them, the wishes of the widow should control.”

Noting that Goldman was an equitable action seeking disinterment, the court stated that in such a case “a court may have to consider the wishes of the decedent’s widow above those of the other members of the decedent’s ‘next of kin.’” However, the court concluded that “any equitable rights [D’s widower] may have had in this matter have been resolved” in the earlier state court proceeding which terminated with a consent decree authorizing D’s disinterment, and therefore the court granted B’s motion to dismiss.

V. CONCLUSION

For the reasons recited herein, it is respectfully submitted that the 2003 Session should: (1) make clarifying amendments to the 2002 legislation dealing with access to powers of attorney in safe-deposit boxes, and payment of taxes by fiduciaries; (2) enact legislation dealing with delivery of powers of attorney and with access to living wills in safe-deposit boxes and providing a generic exception to the seven-year presumption of death rule; (3) repeal the misbegotten incorporation by reference statute, and (4) consider legislation clarifying the rights and priorities of family members regarding the burial of their dead.


188. Mazur, 191 F. Supp. 2d 676, 683 (E.D. Va. 2002). It is clear that the court is referring to “next of kin” here as it is broadly defined for purposes of Chapter 28 of Title 54.1, “Funeral Services.” In one of its footnotes the court states that “[i]t is unclear whether the enactment of Virginia Code § 54.1-2807(B) has abrogated the dicta in Goldman which indicated that a widow’s wishes should prevail over other family members with regard to disposition of her deceased spouse.” Id. at 682 n.6. However, as noted in footnote 176, supra, it appears doubtful that the General Assembly, by enacting section 54.1-2807(B) as a part of legislation intended to regulate funeral homes, also intended thereby to abrogate the Goldman dicta regarding the rights of family members between themselves.

189. Id. at 683.

190. See supra Part II.B.

191. See supra Part II.I.

192. See supra Part II.B.

193. See supra Part II.H.

194. See supra Part II.C.

195. See supra Part IV.B.